No. 14-1468

IN THE

Supreme Court of the United States

DANNY BIRCHFIELD,

Petitioner,

v.

NORTH DAKOTA,

Respondent.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

BRIEF OF RESPONDENT

THOMAS R. MCCARTHY
WILLIAM S. CONSOVOY
J. MICHAEL CONNOLLY
BRYAN K. WEIR
CONSOVOY MCCARTHY PARK PLLC
GEORGE MASON UNIVERSITY
SCHOOL OF LAW SUPREME
COURT CLINIC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423

BRIAN DAVID GROSINGER
Counsel of Record
ASSISTANT STATE'S ATTORNEY
Morton County Courthouse
210 Second Avenue NW
Mandan, North Dakota 58554
(701) 667-3350
brian.grosinger@mortonnd.org

Counsel for Respondent

March 15, 2016

(Additional Counsel Listed on Inside Cover)

264642

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

PATRICK STRAWBRIDGE
CONSOVOY MCCARTHY PARK PLLC
GEORGE MASON UNIVERSITY SCHOOL
OF LAW SUPREME COURT CLINIC
10 Post Office Square
8th Floor South PMB, Suite 706
Boston, MA 02109
(617) 227-0548

MICHAEL PARK
CONSOVOY MCCARTHY PARK PLLC
GEORGE MASON UNIVERSITY SCHOOL
OF LAW SUPREME COURT CLINIC
3 Columbus Circle, 15th Floor
New York, NY 10019
(212) 247-8006

QUESTION PRESENTED

North Dakota law makes it a criminal offense for a motorist who has been arrested for driving under the influence to refuse to submit to a chemical test of the person's blood, breath, or urine to detect the presence of alcohol. The Supreme Court of North Dakota held that the State may criminalize any refusal by a motorist to submit to such a test, even if a warrant has not been obtained. The question presented is:

Whether, in the absence of a warrant, a State may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person's blood.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS..... ii

TABLE OF CITED AUTHORITIES iv

STATEMENT.....1

A. Drunk Driving in the United States and in North Dakota 1

B. Brielle's Law 4

C. Proceedings Below 10

SUMMARY OF ARGUMENT.....14

ARGUMENT.....18

I. North Dakota's Implied-Consent Statute Is Constitutional 18

A. North Dakota's statutory scheme does not directly violate the Fourth Amendment or any other constitutional provision 19

B. North Dakota's implied-consent statute does not impose an unconstitutional condition on the use of public roads.....24

Table of Contents

Page

C. No other decision requires the Court to declare North Dakota's statutory scheme unconstitutional. 35

II. Invalidating North Dakota's Statutory Scheme Would Undermine The States' Ability To Protect The Public From Drunk Drivers. 39

A. Refusal laws are important tools in the battle against drunk driving. 39

B. Upholding North Dakota law is consistent with the Court's broader approach to the unconstitutional-conditions doctrine. 48

C. North Dakota's implied-consent penalties do not vitiate the expectation of privacy protected by the Fourth Amendment. 54

CONCLUSION 56

TABLE OF CITED AUTHORITIES

Page

CASES

Bell v. Wolfish,
441 U.S. 520 (1979) 30, 37

Branti v. Frankel,
445 U.S. 507 (1980) 50, 51

Breithaupt v. Abram,
352 U.S. 432 (1957) 1, 21, 22, 28

Buck v. Kuykendall,
267 U.S. 307 (1925) 32

Camara v. Municipal Court of City and Cty. of San Francisco,
387 U.S. 523 (1967) 36, 37, 38, 39

Chandler v. Miller,
520 U.S. 305 (1997) 36

City of Los Angeles v. Patel,
135 S. Ct. 2443 (2015) ..... *passim*

City of Mandan v. Leno,
618 N.W.2d 161 (N.D. 2000) 8

Connick v. Myers,
461 U.S. 138 (1983) 25, 50

Dixon v. Love,
431 U.S. 105 (1977) 27

Cited Authorities

Page

Dolan v. City of Tigard,
512 U.S. 374 (1994) 51, 53

Ferguson v. City of Charleston,
532 U.S. 67 (2001) 38

Fletcher v. Peck,
10 U.S. (6 Cranch) 87 (1810) 19

Frost & Frost Trucking Co. v. Railroad Comm'n,
271 U.S. 583 (1926) 53

Garcetti v. Ceballos,
547 U.S. 410 (2006) 50

Greenlaw v. United States,
554 U.S. 237 (2008) 37

Grove City Coll. v. Bell,
465 U.S. 555 (1984) 25, 49, 53

Illinois v. Batchelder,
463 U.S. 1112 (1983) 23

John Doe No. 1 v. Reed,
561 U.S. 186 (2010) 40

Kane v. New Jersey,
242 U.S. 160 (1916) 32

Cited Authorities

Page

Koontz v. St. Johns River Water Mgmt. Dist.,
133 S. Ct. 2586 (2013).....51

Lyng v. Automobile Workers,
485 U.S. 360 (1988).....25

Mackey v. Montrym,
443 U.S. 1 (1979)..... *passim*

Maryland v. King,
133 S. Ct. 1958 (2013).....30

Michigan Dep't of State Police v. Sitz,
496 U.S. 444 (1990).....1, 28

Missouri v. McNeely,
133 S. Ct. 1552 (2013)..... *passim*

National Federation of Independent Businesses v. Sebelius,
132 S. Ct. 2566 (2012).....52

National Treasury Employees Union v. Von Raab,
489 U.S. 656 (1989).....38

Nollan v. California Coastal Comm'n,
483 U.S. 825 (1987).....52

Nyflot v. Comm'r of Pub. Safety,
369 N.W.2d 512 (Minn. 1985) 45

Page

Potratz v. N. Dakota Dep't of Transp.,
843 N.W.2d 305 (N.D. 2014) 8

Rust v. Sullivan,
500 U.S. 173 (1991) 49

Rutan v. Republican Party of Illinois,
497 U.S. 62 (1990) 49-50

Schmerber v. California,
384 U.S. 86 (1986) 23, 32

Schneckloth v. Bustamonte,
412 U.S. 218 (1973) 35, 36

Skinner v. Ry. Labor Executives' Ass'n,
489 U.S. 602 (1989) ..... *passim*

Snepp v. United States,
444 U.S. 507 (1980) 25

South Dakota v. Dole,
483 U.S. 203 (1987) 52, 53

South Dakota v. Neville,
459 U.S. 553 (1983) ..... *passim*

State v. Birchfield,
Crim. No. 30-2013-CR-00720
(Morton Cnty. Dist. Ct. Jan. 27, 2014) 12

Cited Authorities

Page

State v. Kouba,
319 N.W.2d 161 (N.D. 1982) 32

State v. Murphy,
516 N.W.2d 285 (N.D. 1994) 4, 45

State v. Zimmerman,
539 N.W.2d 49 (N.D. 1995) 2, 3

Stephenson v. Binford,
287 U.S. 251 (1932) 53

Tennessee v. Garner,
471 U.S. 1 (1985) 40

Timm v. State,
110 N.W.2d 359 (N.D. 1961) 3, 4

U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers,
413 U.S. 548 (1973) 25

United Pub. Workers of Am. v. Mitchell,
330 U.S. 75 (1947) 25

United States v. Horn,
185 F. Supp. 2d 530 (D. Md. 2002) 11

United States v. Jones,
132 S. Ct. 945 (2012) 20

Cited Authorities

Page

Washington State Grange v. Washington State Republican Party, 552 U.S. 442 (2008) 19

Wyman v. James, 400 U.S. 309 (1971) 20, 21

Yellowbird v. N.D. Dep't of Transp., 833 N.W.2d 536 (N.D. 2013) 8

Zap v. United States, 328 U.S. 624 (1946) 25

STATUTES AND OTHER AUTHORITIES

23 U.S.C. § 163(a) 42

42 U.S.C. § 300a-6 49

23 C.F.R. § 1225.1 42

36 C.F.R. § 4.23(c)(2) 44

N.D. Cent. Code § 39-08-01(1)(a) 11, 42

N.D. Cent. Code § 39-08-01(1)(a)-(d) 3

N.D. Cent. Code § 39-08-01(1)(e) 12

N.D. Cent. Code § 39-08-01(1)(e)(2) 8

Cited Authorities

Page

N.D. Cent. Code § 39-08-01(1)(e)(3) 8, 11

N.D. Cent. Code § 39-08-01(3) 9, 11

N.D. Cent. Code § 39-08-01(5)(a)(2). 9, 42, 47, 55

N.D. Cent. Code § 39-08-01(5)(a)-(i) 9

N.D. Cent. Code § 39-20-01 . . . . . .3, 4, 8, 39-40

N.D. Cent. Code § 39-20-01(2) 8, 54

N.D. Cent. Code § 39-20-01(3) 11

N.D. Cent. Code § 39-20-01(3)(a) 9

N.D. Cent. Code § 39-20-02 9

N.D. Cent. Code § 39-20-04(1) 9

N.D. Cent. Code § 39-20-07 8

N.D. Cent. Code § 39-20-14(3) 8

N.D. Cent. Code § 54-12-27 5

N.D. Cent. Code § 54-12-28 5

N.D. Cent. Code § 54-12-31 5

Cited Authorities

Page

NCUTLO DWI Model Code § 102(a) 44

Centers for Disease Control & Prevention, Drunk Driving Death Rates by State 2012 1

Centers for Disease Control & Prevention, Sobering Facts: Drunk Driving in North Dakota 1 (Dec. 2014).....1

John Hoffman, *Implied Consent with a Twist: Adding Blood to New Jersey's Implied Consent Law and Criminalizing Refusal Where Drinking and Driving Results in Death or Serious Injury*, 35 Rutgers L.J. 345 (2003) 2

Larry Forman, *Why You Should Always Refuse the Breathalyzer and the Standardized Field Sobriety Tests*, Larry Forman Law Blog (May 11, 2014).....43

National Institute on Alcohol Abuse and Alcoholism, Alcohol Overdose: The Dangers of Drinking Too Much (Oct. 2015) 11

New Details on a Fatal Accident That Killed 4 People, WDAY News (July 26, 2012).....4

Page

NHTSA, Alcohol & Highway Safety: A Review of the State of Knowledge 174 (No. 811374, Mar. 2011) 42

NHTSA, Breath Test Refusal Rates in the United States–2011 Update 1 (No. 811881, Mar. 2014),.....42

NHTSA, Breath Test Refusals and Their Effect on DWI Prosecutions 45-46 (No. 811551, July 2012) 45

NHTSA, Countermeasures That Work: A Highway Safety Countermeasure Guide for State Highway Safety Offices, 1-7 (No. 811727, April 2013).....44, 46

NHTSA, Digest of Impaired Driving and Selected Beverage Control Laws (No. 812119, Feb. 2015) 2

NHTSA, Extent of Driving While Suspended for DWI (No. 278, July 2003) 43

NHTSA, Traffic Safety Facts, 2014 Data 2 (No. 812231, Dec. 2015) 1

NHTSA, Traffic Safety Facts, 2014 Crash Data Key Findings 1 (No. 812219, Nov. 2015) 40

Cited Authorities

Page

Nick Smith, *Two Grieving Families Push for Stronger DUI Laws*, Bismarck Trib. (Feb. 1, 2013).....5

North Dakota Dep't of Transp., *2014 North Dakota Crash Summary 35* (2014) 10

North Dakota Dep't of Transp., *North Dakota Traffic Fatalities Lowest in Five Years* 1 (Jan. 7, 2016).....10

On a Mission for the Boys: Parents Lobby Legislature for Tougher DUI Laws, Grand Forks Herald (Jan. 15, 2013).....5

Robert B. Voas, *et al.*, *Implied-consent laws: A review of the literature and examination of current problems and related statutes*, 40 J. of Safety Research 77 (2009).....41

Robyn D. Robertson and Herb M. Simpson, *DWI System Improvement for Dealing with Hard Core Drinking Drivers*, Traffic Injury Research Foundation (June 2002).....41, 43, 44

Tina Wescott Cafaro, *Fixing the Fatal Flaws in OUI Implied Consent Laws*, 34 J. Legis. 99 (2008)..... 42, 44

STATEMENT

A. Drunk Driving in the United States and in North Dakota

"No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990). Indeed, "this Court has 'repeatedly lamented the tragedy.'" *Id.* (quoting *South Dakota v. Neville*, 459 U.S. 553, 558 (1983)). "'The increasing slaughter on our highways ... reaches the astounding figures only heard of on the battlefield.'" *Id.* (quoting *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957)).

Between 2005 and 2014, 112,998 people were killed in alcohol-impaired-driving crashes in the United States. National Highway Traffic Safety Administration ("NHTSA"), Traffic Safety Facts, 2014 Data 2 (No. 812231, Dec. 2015), http://goo.gl/ktKi4t. In 2014 alone, 9,967 people were killed in such crashes; that amounts to roughly one death every 53 minutes. *Id.* at 1.

North Dakota has suffered more than its share of this carnage. On a per-population basis, North Dakota had the highest drunk-driving death rate in the United States in 2012, with 11.3 deaths per 100,000 people. Centers for Disease Control & Prevention, Drunk Driving Death Rates by State 2012, http://goo.gl/KsHtIZ. That was more than three times the national average. Centers for Disease Control & Prevention, Sobering Facts: Drunk Driving in North Dakota 1 (Dec. 2014), http://goo.gl/Qt9Nzz.

Efforts to combat drunk driving in the United States date back nearly a century, to the beginning of the mass-production of automobiles. But early laws criminalizing drunk driving were difficult to enforce because of the evidentiary problem of proving that drivers were "grossly intoxicated." John Hoffman, *Implied Consent with a Twist: Adding Blood to New Jersey's Implied Consent Law and Criminalizing Refusal Where Drinking and Driving Results in Death or Serious Injury*, 35 Rutgers L.J. 345, 347 (2003). States responded by passing drunk driving laws that permitted the use of blood alcohol concentration ("BAC") as evidence of intoxication. *Id.* at 348. In the 1960s, States adopted the first *per se* drunk driving laws. *Id.* at 348-49. Under these laws, prosecutors no longer had to prove actual impairment; a BAC above a certain level (typically 0.15%) was generally sufficient to secure a conviction. *Id.* at 349.

Efforts to curb drunk driving continued through the ensuing decades. The federal government eventually tied highway funding to States enacting 0.08% BAC *per se* laws. *Id.* at 348-49 & n.29. By 2005, the fifty States, the District of Columbia, and Puerto Rico all had enacted 0.08% BAC *per se* drunk driving laws. NHTSA, Digest of Impaired Driving and Selected Beverage Control Laws v (No. 812119, Feb. 2015), http://goo.gl/dMlNHp.

North Dakota, like most States, has spent much of the automotive era combatting drunk driving. Since 1923, North Dakota has criminalized the operation of motor vehicles while intoxicated. 1923 N.D. Laws 359-60; *State v. Zimmerman*, 539 N.W.2d 49, 51 (N.D. 1995). Under current law, North Dakota outlaws driving on public roads under the influence of alcohol, drugs, or other substances.

Specifically, a person may not drive a vehicle on public roads if he: (1) "has an alcohol concentration of at least [0.08%] at the time of the performance of a chemical test within two hours after the driving or being in actual physical control of a vehicle"; (2) is "under the influence of intoxicating liquor"; (3) is "under the influence of any drug or substance or combination of drugs or substances to a degree which renders that person incapable of safely driving"; or (4) is "under the combined influence of alcohol and any other drugs or substances to a degree which renders that person incapable of safe driving." N.D. Cent. Code § 39-08-01(1)(a)-(d).

To aid these efforts, North Dakota has long imposed penalties on suspected drunken drivers who refuse to submit to chemical tests to determine the presence of alcohol, drugs, or other substances in their bodies. 1959 N.D. Laws 475-79; *Zimmerman*, 539 N.W.2d at 51. In the Implied Consent Act of 1959, North Dakota provided that "[a]ny person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent subject to the provisions of this chapter to a chemical test, or tests, of his blood, breath, saliva, or urine for the purpose of determining the alcoholic content of his blood." N.D. Cent. Code § 39-20-01 (1960); *Timm v. State*, 110 N.W.2d 359, 362 (N.D. 1961). An officer could administer this test "only after placing such person ... under arrest and informing him that he is and will be charged with the offense of driving ... upon the public highways while under the influence of intoxicating liquor." N.D. Cent. Code § 39-20-01 (1960).

Instead of permitting officers to forcibly administer a test over the arrestee's objection, North Dakota elected

to penalize the refusal to submit to chemical testing. *Id.* § 39-20-04 (1960). First, the State would revoke, for a period of six months, the individual's driver's license. *Id.* Second, the State could use the individual's refusal as evidence in a criminal prosecution. *Id.* § 39-20-08 (1960). North Dakota courts have upheld these penalties as valid exercises of the State's police power. *State v. Murphy*, 516 N.W.2d 285, 287 (N.D. 1994); *Timm*, 110 N.W.2d at 362-63. This Court also has upheld laws of this kind. *Neville*, 459 U.S. 553; *Mackey v. Montrym*, 443 U.S. 1 (1979). North Dakota's implied consent law continues in this same basic form today. N.D. Cent. Code § 39-20-01, *et seq.*

B. Brielle's Law

On July 6, 2012, Aaron and Allison Deutscher were driving with their eighteen-month old daughter, Brielle, to Bismarck, North Dakota to attend a family reunion. Allison was pregnant with her second child. Driving toward them was Wyatt Klein. That day, Klein had visited two bars and consumed seven or eight beers and three shots of tequila. Before leaving the second bar, Klein purchased two beers to take home with him. Klein drove his truck the wrong way on the highway and struck the Deutschers' car head-on. Aaron, Allison, and Brielle were all killed instantly. Klein also was killed. His BAC was 0.25%—more than three times the legal limit. Legislative History of HB1302 at 332-33, http://goo.gl/JL8OHu ("HB1302 History"); *New Details on a Fatal Accident That Killed 4 People*, WDAY News (July 26, 2012), http://goo.gl/rw2MQS. Klein had a history of drunk driving violations. HB1302 History at 332.

The next day, July 7, 2012, Juan Ruiz took his five- and nine-year-old sons, Alaries and Cyris, to Lake Metigoshe in North Dakota. They spent the day swimming and boating. That night, the boys pitched a tent and stayed up late telling stories. Finally, their father told them it was time for bed because they planned to wake up early the next morning to go fishing. A few hours later, around 1:00 am, Juan Acosta was driving his truck through the campground. Acosta had been drinking and smoking marijuana that day. He lost control of the truck and careened into the tent, running over Alaries and Cyris who were inside. Juan Ruiz awoke and tried to free his sons from beneath the truck, to no avail. Alaries and Cyris died on the scene. Juan Ruiz suffered a collapsed lung, broken ribs, and other internal injuries. Acosta survived. His BAC was 0.17%—more than twice the legal limit. HB1302 History at 338-40; *On a Mission for the Boys: Parents Lobby Legislature for Tougher DUI Laws*, Grand Forks Herald (Jan. 15, 2013), http://goo.gl/Bb2Ct6.

These tragic deaths galvanized the State to address its drunk-driving epidemic. *See, e.g.*, Nick Smith, *Two Grieving Families Push for Stronger DUI Laws*, Bismarck Trib. (Feb. 1, 2013), http://goo.gl/WfhAUT. Legislators proposed a law known as "Brielle's law," after Brielle Deutscher, that would, among other things, increase penalties for driving under the influence, encourage participation in the State's 24/7 Sobriety Program,[1] and make a refusal to submit to a chemical test a criminal

1. The 24/7 Sobriety Program allows individuals who commit alcohol-related offenses to avoid incarceration by, among other things, agreeing to refrain from using alcohol and submitting to daily sobriety testing. N.D. Cent. Code §§ 54-12-27, 54-12-28, 54-12-31.

violation. Members of families affected by drunk driving testified in support of the legislation, as did many others. *See, e.g.*, HB1302 History at 7-9, 63, 296, 332-33, 338-40, 399-403, 501.

During the committee hearings, State legislators studied the crisis of drunk driving in North Dakota. North Dakota's rates of alcohol-related fatalities and adult and underage binge drinking were among the highest in the nation. *Id.* at 315, 325. According to its Attorney General, in 2011, North Dakota had 6,600 arrests for driving under the influence, approximately one out of every 100 people in the State. *Id.* at 2-3. Repeat offenders committed roughly one-third of those 6,600 violations. *Id.* In 2010, more than half of all crashes resulting in deaths were alcohol-related, which was almost twice the national average. *Id.* at 313, 315, 336. In 2011, one alcohol-related crash occurred every 8.6 hours, and one alcohol-related fatality occurred every 5.5 days. *Id.* at 315. Moreover, high levels of intoxication were common. The average recorded BAC (as measured by blood tests) was over twice the legal limit, and the average BAC for drivers involved in a fatal crash was even higher. *Id.* at 315. Drug-impaired driving also was becoming "an ever-increasing problem in the state." *Id.* at 390.

Over and over, witnesses and legislators testified about the need for a "cultural change" regarding drunk driving. As one police officer explained, "[i]n high school during the 1970s drinking and driving was our pastime. To be arrested for driving under the influence was almost viewed as a passage to manhood.... We can no longer view driving drunk as just another traffic violation." *Id.* at 319; *id.* at 296 ("Tragedies, such as the one which took the young lives of the Deutscher family from West Fargo,

make it clear that we have a problem with the culture of drinking and driving in our state."). Many believed that tougher laws and increased access to educational programs would help. As the State Attorney General explained, "there [are] a number of people who think[] that everybody is entitled to one DUI and then we should get tough on them. We are at the light end nationally for penalties.... The lesson we learn from other states with tougher laws is that [they do] have an effect." *Id.* at 3-4; *id.* at 7 ("[T]here is no deterrent with the current law.").

Legislators were particularly concerned with the numbers of impaired drivers who escaped punishment by refusing chemical tests for alcohol and drugs. In 2011, 18.8% of those arrested for driving under the influence (1,169 people) refused to take a chemical test. *Id.* at 298. They were "very difficult to prosecute criminally" because the State lacked concrete evidence to convict them. *Id.* at 156. In addition, the primary administrative punishment available—*i.e.*, revoking a driver's license—often had little deterrent effect because offenders would simply continue to drive without a license. *Id.* at 3, 62.

Lawmakers ultimately determined that imposing criminal penalties would further deter refusal of chemical tests by foreclosing the ability of impaired drivers to escape punishment. Legislators also viewed this as a safer route than the only alternative: forced testing over the objection of the arrestee, which would require police officers to "physically hold [a person] down." *Id.* at 3. They feared that this would lead to aggressive confrontations and endanger officers, "especially [those] in rural [North Dakota] where there may be only one officer." *Id.* at 3.

Under the revised law, use of North Dakota's public roads is still conditioned on the driver's agreement to submit to "a chemical test, or tests, of the individual's blood, breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, at the direction of a law enforcement officer under section 39-20-01." N.D. Cent. Code § 39-08-01(1)(e)(2).[2] And the results of such a test are still admissible as evidence to prove the driver was intoxicated. *City of Mandan v. Leno*, 618 N.W.2d 161, 164 (N.D. 2000) (citing N.D. Cent. Code § 39-20-07).

Under Section 39-20-01, a police officer can require a chemical test only if he first places the individual under arrest and informs him that he is being or will be charged with driving under the influence. N.D. Cent. Code § 39-20-01(2). The officer also must inform the individual that "North Dakota law requires the individual to take the test to determine whether the individual is under the influence of alcohol or drugs; that refusal to take the test directed by the law enforcement officer is a crime punishable in the same manner as driving under the influence; and that refusal of the individual to submit to the test directed by

---

2. An onsite screening test of an individual's breath is a different type of test; its results are not admissible as evidence. An onsite test is used only "for the purpose of estimating the alcohol concentration in the individual's breath," N.D. Cent. Code § 39-08-01(1)(e)(3), so that the officer can determine "whether or not a further test shall be given under the provisions of section 39-20-01," *id.* § 39-20-14(3), and whether "there are reasonable grounds to arrest the individual," *Yellowbird v. N.D. Dep't of Transp.*, 833 N.W.2d 536, 539 (N.D. 2013) (citation omitted). And it is administered through the use of a different device. *Potratz v. N. Dakota Dep't of Transp.*, 843 N.W.2d 305, 307 (N.D. 2014).

the law enforcement officer may result in a revocation ... of the individual's driving privileges." N.D. Cent. Code § 39-20-01(3)(a).[3] "If a person refuses to submit to testing under section 39-20-01 ..., none may be given." N.D. Cent. Code § 39-20-04(1).

By refusing the test, however, the individual commits a class B misdemeanor for the first or second offense in a seven-year period, a class A misdemeanor for a third offense in a seven-year period, and a class C felony for any fourth or subsequent offense within a fifteen-year period. N.D. Cent. Code § 39-08-01(3). Available penalties include fines, imprisonment, addiction evaluation by a licensed addiction treatment program, and participation in the State's 24/7 Sobriety Program. N.D. Cent. Code § 39-08-01(5)(a)-(i). In addition, the individual's driver's license shall be revoked for a period ranging from 180 days to three years. N.D. Cent. Code § 39-20-04(1). In some cases, these penalties mirror those for driving under the influence. But an arrestee who records a BAC of 0.16% or higher will face tougher fines and penalties (potentially including mandatory imprisonment) than an individual who refuses a chemical test. N.D. Cent. Code § 39-08-01(5)(a)(2).

On April 26, 2013, the legislature passed Brielle's law. Three days later, Governor Jack Dalrymple signed the bill into law. Since then, North Dakota has experienced a significant decrease in drunk-driving fatalities. In 2012, the year before Brielle's law was enacted, 51% of crashes

---

3. "Only an individual medically qualified to draw blood, acting at the request of a law enforcement officer, may withdraw blood for the purpose of determining the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood." N.D. Cent. Code § 39-20-02.

resulted in alcohol-related fatalities. North Dakota Dep't of Transp., *2014 North Dakota Crash Summary* 35 (2014), https://goo.gl/L8PxCv. Three years later, only 41% of crashes resulting in fatalities were alcohol-related—the lowest rate in more than a decade. North Dakota Dep't of Transp., *North Dakota Traffic Fatalities Lowest in Five Years* 1 (Jan. 7, 2016), https://goo.gl/HP3zxj. During the same period, the number of deaths from alcohol-related crashes dropped by 38 percent. *2014 North Dakota Crash Summary, supra,* at 35; *North Dakota Traffic Fatalities Lowest in Five Years, supra,* at 1.

C. Proceedings Below

On October 10, 2013, Petitioner Danny Ray Birchfield drove his car into a ditch off of a highway in Morton County, North Dakota. State Trooper Tarek Chase arrived on the scene and observed Birchfield attempting to drive out of the ditch. As the officer approached Birchfield, he smelled a strong odor of alcohol and saw that his eyes were bloodshot and watery. When the officer spoke with him, he noticed that Birchfield's speech was slurred. When Birchfield stepped out of the car, the officer noticed that he was unsteady on his feet. Based on these observations, he suspected Birchfield of being intoxicated. Opposition to Motion to Dismiss ("Opp.") (Doc. 28) at 1-2.

Trooper Chase asked Birchfield if he would submit to field sobriety testing; Birchfield agreed. The officer conducted four field sobriety tests. First, he conducted the Horizontal Gaze Nystagmus ("HGN") test, which requires the officer to shine a light in front of the suspect and watch his eye movement for involuntary twitching. Birchfield failed this test, showing all six indicia of impairment.[4]

4. Under the HGN test, the officer is trained to look for six

Second, the officer conducted the alphabet test, which requires the suspect to recite sections of the alphabet in order. Birchfield performed poorly, pausing numerous times. Third, the officer conducted the backwards-counting test, which requires the suspect to count backwards from one number to another. Birchfield again performed poorly, pausing numerous times and failing to stop when requested. Fourth, the officer conducted the finger count test, which requires the subject to touch the tips of his fingers to the tip of his thumb, counting as he proceeds. Birchfield performed poorly yet again, displaying poor finger dexterity and improper finger count. Opp. 1.

After administering these four tests, Trooper Chase believed that Birchfield was intoxicated and thus read Birchfield the implied consent advisory as required by State law. Opp. 1-2; N.D. Cent. Code § 39-08-01(1)(e)(3), § 39-20-01(3). The officer requested an onsite screening test of his breath, and Birchfield agreed. The breath test indicated that his BAC was 0.254%, which is more than three times the legal limit.[5] Opp. 1-2; N.D. Cent. Code § 39-08-01(1)(a).

"clues" of impairment. If the officer observes four or more clues, it is likely that the suspect's BAC is above 0.10%. *United States v. Horn*, 185 F. Supp. 2d 530, 537 (D. Md. 2002).

5. At this BAC, Birchfield's speech, memory, coordination, attention, reaction time, and balance would have been "significantly impaired." National Institute on Alcohol Abuse and Alcoholism, *Alcohol Overdose: The Dangers of Drinking Too Much* (Oct. 2015), http://goo.gl/hSyS46. Birchfield also would have been at risk for blackouts, vomiting, and loss of consciousness. *Id.* Therefore, his "driving-related skills, judgment, and decisionmaking" would have been "dangerously impaired." *Id.*

After Birchfield failed the onsite test, Trooper Chase arrested him for driving under the influence. The officer read him his *Miranda* rights and the implied consent advisory a second time. The officer then asked Birchfield to take a chemical test of his blood. Birchfield refused. He was charged with driving under the influence of alcohol or drugs and/or refusing to submit to a chemical test after request by a law enforcement officer. Because this was Birchfield's second alcohol-related offense within seven years, *State v. Birchfield*, Crim. No. 30-2013-CR-00720 (Morton Cnty. Dist. Ct. Jan. 27, 2014) (Doc. 26) (pleading guilty to driving under the influence under N.D. Cent. Code 39-08-01), the charge was listed as a class B misdemeanor. Birchfield also was charged with driving with a suspended license (alcohol-related) and driving without liability insurance. Opp. 1-2.[6]

Birchfield moved to dismiss the refusal charge, asking the district court to find N.D. Cent. Code § 39-08-01(1)(e) unconstitutional under the Fourth Amendment and the North Dakota Constitution. The district court denied the motion, concluding that Birchfield's Fourth Amendment rights were not violated. Because Birchfield refused the test, "the requested search, the blood draw, was not conducted." Petition Appendix ("Pet. App.") 26a. Accordingly, "[t]here was no search so there was no Fourth Amendment violation." *Id.* North Dakota, the court explained, had long imposed administrative penalties for

---

6. Because this was Birchfield's second alcohol-related offense, he was placed in the State's 24/7 Sobriety Program, which required him to refrain from using alcohol while on probation. *See supra* 5 n.1. On March 10, 2014, a warrant was issued for Birchfield's arrest because he had three alcohol consumption events since his last arrest. Bench Warrant (Doc. 45).

refusing a chemical test and allowed such a refusal to be used as evidence in a criminal prosecution. *Id.* Making such a refusal "a separate crime and not merely evidence to prove the crime of a DUI" did not render the law unconstitutional. Pet. App. 26a.

The Supreme Court of North Dakota affirmed. The court explained that "[d]riving is a privilege, not a constitutional right and is subject to reasonable control by the State under its police power." Pet. App. 3a-4a. The court held that North Dakota, like many other States, had made a reasonable decision to impose penalties on those who refused to consent to a chemical test when probable cause existed to believe they had been driving while intoxicated. Pet. App. 5a-7a.

In its view, this Court's decision in *Missouri v. McNeely*, which held only that "in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant," 133 S. Ct. 1552, 1568 (2013), did not alter the analysis, Pet. App. 8a-9a. *McNeely* had recognized that "all 50 States have adopted implied consent laws" that "impose significant consequences when a motorist withdraws consent," including suspending the driver's license and allowing the refusal to be used as evidence in a subsequent criminal prosecution. Pet. App. 8a (quoting *McNeely*, 133 S. Ct. at 1566). The court did not understand *McNeely* to suggest that taking the additional step of criminalizing the refusal violated the Fourth Amendment. Pet. 8a-9a. Indeed, multiple state and federal courts had rejected such arguments. Pet. App. 9a-10a (listing cases). The other cases upon which Birchfield relied were distinguishable

because they were not "decided in the context of drunk-driving prosecutions where an officer had probable cause to search a defendant's body." Pet. App. 14a.

The court added that the "touchstone of the Fourth Amendment is reasonableness" and important government interests outweighed the minor intrusions on privacy. Pet. App. 14a-15a. "A licensed driver has a diminished expectation of privacy with respect to enforcement of drunk-driving laws because he or she is presumed to know the laws governing the operation of a motor vehicle, and the implied consent laws contain safeguards to prohibit suspicionless requests by law enforcement officers to submit to a chemical test." Pet. App. 15a. "The Legislature created a statutory right to refuse a chemical test, but has attached significant consequences to refusal so a driver may not avoid the potential consequences of test submission and gain an advantage by simply refusing the test." *Id.* Such a law "reduces the likelihood that drunk drivers will avoid a criminal penalty by refusing to take a test, and, therefore, it is reasonable because it is an efficient tool in discouraging drunk driving." Pet. App. 16a (citation omitted).

SUMMARY OF ARGUMENT

North Dakota's statutory scheme, like myriad laws throughout the country, employs an "implied consent" model. In return for access to North Dakota's public roads, drivers consent to taking a chemical test upon arrest for drunk driving. The arrestee may revoke his consent; in so doing, he will avoid a nonconsensual warrantless search. Revoking consent does, however, subject the individual to civil and criminal penalties. The law is constitutional.

The statutory condition does not violate the Fourth Amendment. By definition, the Fourth Amendment is not implicated unless there is a search. Birchfield was never searched. Nor does the statute directly violate any other constitutional provision. The Court has repeatedly upheld implied consent statutes of this kind against various due process challenges. The Court has rejected Fifth Amendment challenges as well. Together, these cases hold—as *McNeely* reiterated—it is constitutional to penalize revocation of consent to take a chemical test under these circumstances by suspending the driver's license and/or using the fact of the refusal as evidence against him in a criminal proceeding. Notably, Birchfield does not argue otherwise.

Instead, as the question presented indicates, Birchfield's argument is that it violates the unconstitutional-conditions doctrine to "make it a crime" to revoke consent. The Court should reject that argument for several reasons. As an initial matter, Birchfield was convicted of a misdemeanor equal to the least serious charge for driving under the influence of alcohol or drugs. If *that* penalty does not cross a constitutional line, his facial attack on North Dakota law cannot succeed. Moreover, Birchfield cannot prevail by contending, as he does, that all conditions on constitutional rights are always unlawful (or at least always unlawful in the Fourth Amendment context). Myriad decisions reject the former proposition, and the Court's decisions upholding civil penalties for revoking consent necessarily reject the latter. In all manner of constitutional settings, the Court has closely reviewed the government condition, upholding some and invalidating others.

In these cases, the Court weighs: (1) the importance of the government interest; (2) the constitutional right the individual must forgo and the degree of interference with that right; and (3) the nature of the condition. Here, the balance tips in favor of upholding the law. Foremost, North Dakota has a compelling interest in combating drunk driving. This statute substantially advances that interest in multiple ways. The statute deters drunk driving, encourages arrestees to take the chemical test, and avoids physical confrontations between the police and inebriated suspects. Stated differently, the statistical evidence confirms that absent the ability to punish revocation of consent, there will be more drunk-driving fatalities, it will be more difficult to secure drunk-driving convictions, and the police will feel compelled to use force to secure the evidence needed to obtain a conviction for drunk driving.

Those government interests far outweigh the limited interference with an arrestee's right to require the police to secure a warrant before conducting the search. The right to demand that police secure a warrant here is at the periphery of the Fourth Amendment. This is not a situation in which police will have difficulty doing so. In *McNeely*, the Court divided over if and when a warrant would be needed or when exigent circumstances would obviate the warrant requirement. But no Member of the Court doubted that probable cause to conduct a BAC test would exist virtually every time an individual is arrested for drunk driving. There certainly was probable cause in this case. Hence, this is not a situation where, but for the statutory condition, no search is likely to occur. Further, interference with that right is minimal. The chemical test is a search. But this Court has repeatedly held that

it is minimally invasive. In sum, this condition bears no resemblance to the suspicionless, warrantless, searches of an individual's home or business to which Birchfield compares it.

Moreover, it is settled law that driving on public roads is a privilege. Birchfield claims that, in today's world, driving is important. And that is a fair point. But it only undermines his argument given his concession that an individual's driver's license may be suspended for revoking consent to take a chemical BAC test. Birchfield offers little argument as to why making revocation of consent a misdemeanor is decisive. Simply asserting that it should be "obvious" without explanation suggests that he has no answer. Indeed, for all the reasons set forth above, charging Birchfield with a misdemeanor for revoking his consent was entirely reasonable.

Birchfield's arguments as to why precedent requires invalidation of North Dakota law all miss the mark. He argues that implying consent is incompatible with the Fourth Amendment's "totality of circumstances" test for voluntariness. But that test is used when there has been a search—it is not a substitute for an unconstitutional-conditions analysis. Birchfield's reliance on other Fourth Amendment theories, such as the "special needs" and "administrative" search cases, is similarly misplaced. Those decisions provide an exception to the warrant and probable cause requirements for certain types of searches. No search occurred here, so no exception is needed.

Birchfield's fundamental point is that the failure to rely on consent in those cases is an indication that the argument cannot prevail here. But both his premise and

his conclusion are wrong. The Court did not reach the issue in those cases because no party raised it. No party raised it because those requirements were not conditioned on receipt of a benefit or privilege. And, had they been, the case for upholding the condition would have been far weaker than it is here.

In the end, the Court has always taken a practical approach to issues of this sort. That is the clear lesson of the Court's free speech, takings, and government spending decisions. It is not now—nor has it ever been—an all-or-nothing proposition. The fundamental question is whether the condition is reasonable given the government's practical need to impose it. It is difficult to overstate the importance of this condition. The States have been waging a battle against drunk driving for nearly a century. Over that time, this Court has consistently validated the use of implied consent laws as an important weapon in that fight. This was not an effort to circumvent *McNeely* or any other decision. Through experience, the States learned that making it a crime (almost always a misdemeanor) to refuse a chemical test upon a drunk-driving arrest saves lives. The judgment of the Supreme Court of North Dakota should be affirmed.

ARGUMENT

I. North Dakota's Implied-Consent Statute Is Constitutional.

Birchfield brings a facial challenge to North Dakota's implied-consent statute. To prevail, he faces a high bar. First, whether a State has exercised its police power in a manner that conflicts with the Constitution "is, at all

times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810). Second, because this is a facial challenge, Birchfield must establish that the North Dakota "law is unconstitutional in all of its applications." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008). He cannot carry this burden.

North Dakota did not directly violate the Fourth Amendment. If Birchfield does not consent to a chemical test at the time of his arrest, he will not be subject to a nonconsensual warrantless search. Moreover, courts have upheld implied-consent laws similar to this one against due process and Fifth Amendment challenges. Nor does the law violate the unconstitutional-conditions doctrine. This Court has previously upheld—and recently endorsed—laws that penalize drunk-driving arrestees who revoke their consent to take a chemical test by suspending their driver's license and using the refusal as evidence against them to secure a criminal conviction. North Dakota's decision also to make Birchfield's revocation of consent a misdemeanor is not unconstitutional.

A. North Dakota's statutory scheme does not directly violate the Fourth Amendment or any other constitutional provision.

Birchfield argues at length that a chemical test is a search under the Fourth Amendment and, accordingly, may not be taken without a warrant unless an exception to that requirement applies. Brief for Petitioner ("Br.") 12-20. Birchfield is right, but his point is irrelevant. "The Fourth Amendment protects '[t]he right of the people to

be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451-52 (2015) (quoting U.S. Const. amend. IV). A Fourth Amendment issue thus arises only if there is a "search" or "seizure." *United States v. Jones*, 132 S. Ct. 945, 949 (2012).

No search occurred. The arresting officers sought Birchfield's consent to perform the chemical test. When he refused, no chemical test was conducted. *See supra* 12. As a result, Birchfield's lengthy Fourth Amendment argument is irrelevant.

The Court's ruling in *Wyman v. James*, 400 U.S. 309 (1971), illustrates the point. There, beneficiaries of New York's Aid to Families with Dependent Children program were required to submit to in-home visits as a condition of receiving assistance. *Id.* at 313-14. The Court rejected a Fourth Amendment challenge "for the seemingly obvious and simple reason that we are not concerned here with any search by the New York social service agency in the Fourth Amendment meaning of that term." *Id.* at 317. "If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be. There is no entry of the home and there is no search." *Id.* at 317-18.

To be certain, the Court noted, in dicta, "that the beneficiary's denial of permission [was] not a criminal act," *id.* at 317, and that there was a question as to whether "the average beneficiary might feel she is in no position to refuse consent to the visit," *id.* at 318. But those issues would have been relevant to whether the in-home visit requirement was an unconditional condition—not whether

a beneficiary could raise a Fourth Amendment objection when there was no search. The Court did not have to pass on that issue though because it held, in the alternative, that the search would have been reasonable under the Fourth Amendment had it occurred. *Id.* at 318-26.

Here, the unconstitutional-conditions question that *Wyman* did not reach is presented. Whether Birchfield may be convicted of a misdemeanor for refusing to take the chemical test therefore must be analyzed through that lens. *See infra* 24-34. Birchfield cannot avoid that issue by framing this as a Fourth Amendment case.

The North Dakota law also does not directly violate any other constitutional provision. Although Birchfield fails to mention it, the Court consistently has approved of such statutes, and the consequences they imposed, against all manner of challenges. In *Breithaupt v. Abram*, 352 U.S. 432 (1957), for example, the Court rejected the petitioner's argument "that his conviction, based on the result of [an] involuntary blood test, deprived him of his liberty without that due process of law guaranteed him by the Fourteenth Amendment," *id.* at 434. The Court held that the "absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right." *Id.* at 435. "It might be a fair assumption," the Court added, "that a driver on the highways in obedience to a policy of the State, would consent to have a blood test made as part of a sensible and civilized system protecting himself as well as other citizens not only from the hazards of the road due to drunken driving, but also from some use of dubious lay testimony." *Id.* at 435 n.2. An involuntary "blood test taken by a skilled technician is not such conduct that shocks the conscience, nor such a method of

obtaining evidence that it offends a sense of justice." *Id.* at 437 (citations and quotations omitted).

The Court likewise upheld against a due process challenge "a Massachusetts statute that mandate[d] suspension of a driver's license because of [the person's] refusal to take a breath-analysis test upon arrest for driving while under the influence of intoxicating liquor." *Mackey*, 443 U.S. at 3. The respondent objected to a provision of the Massachusetts "implied consent law" that resulted in the suspension of his license before he received a hearing. *Id.* The Court recognized the driver's "substantial" interest "in continued possession and use of his license pending the outcome of the hearing due him." *Id.* at 11. But "the paramount interest the Commonwealth has in preserving the safety of its public highways" outweighed that substantial interest. *Id.* at 17. In the Court's view, "States surely have at least as much interest in removing drunken drivers from their highways as in summarily seizing mislabeled drugs or destroying spoiled foodstuffs." *Id.*

The Court found that immediate suspension was "critical to attainment" of three important objectives. *Id.* at 18. "First, the very existence of the summary sanction ... serves as a deterrent to drunk driving. Second, it provides strong inducement to take the breath-analysis test and thus effectuates the Commonwealth's interest in obtaining reliable and relevant evidence for use in subsequent criminal proceedings." *Id.* And, third, "in promptly removing such drivers from the road, the summary sanction of the statute contributes to the safety of public highways." *Id.* In sum, "the compelling interest in highway safety justifie[d] the Commonwealth in making a summary suspension effective pending the outcome of

the prompt postsuspension hearing available." *Id.* at 19; *Illinois v. Batchelder*, 463 U.S. 1112, 1116 (1983) (per curiam).

Finally, the Court has held "that the admission into evidence of a defendant's refusal to submit to a [chemical] test does not offend the right against self-incrimination." *Neville*, 459 U.S. at 554. South Dakota's "implied consent" law provided that "any person operating a vehicle in South Dakota is deemed to have consented to a chemical test of the alcohol content of his blood if arrested for driving while intoxicated." *Id.* at 559. But South Dakota "declined to authorize its police officers to administer a blood-alcohol test against the suspect's will. Rather, to avoid violent confrontations, the ... statute permits a suspect to refuse the test, and indeed requires police officers to inform the suspect of his right to refuse." *Id.* at 559-60. Exercising that right was "not without a price, however." *Id.* at 560. Foremost, it resulted in a one-year suspension of driving privileges—an "unquestionably legitimate" penalty. *Id.* (citing *Mackey*, 433 U.S. 1).

To "further discourage[]" refusal, South Dakota also made the fact of a defendant's refusal admissible "against the defendant at trial." *Id.* Relying on *Schmerber v. California*, 384 U.S. 86 (1986), which held that admission into evidence of the test result itself did not violate the Fifth Amendment, the Court sustained the penalty for refusing to take a chemical test. If it had a lawful basis for doing so, "the state could legitimately compel the suspect, against his will, to accede to the test." *Id.* at 563. The law "becomes no *less* legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice." *Id.* In other words, this was not "a

case where the State has subtly coerced respondent into choosing the option it had no right to compel, rather than offering a true choice." *Id.* at 563-64. "To the contrary, the State wants respondent to choose to take the test, for the inference of intoxication arising from a positive blood-alcohol test is far stronger than that arising from a refusal to take the test." *Id.* at 564.

The key insight was that "no impermissible coercion is involved when the suspect refuses to submit to take the test." *Id.* at 562. The Court was under no illusion "that the choice to submit or refuse to take a blood-alcohol test" would be "an easy or pleasant one for a suspect to make." *Id.* at 564. "But the criminal process often requires suspects and defendants to make difficult choices." *Id.* Consequently, "a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination." *Id.*

B. North Dakota's implied-consent statute does not impose an unconstitutional condition on the use of public roads.

Because North Dakota law does not directly violate any provision of the Constitution, the only question in this case is whether it violates the unconstitutional-conditions doctrine. Specifically, the issue is whether conditioning use of North Dakota's roads on consent to a chemical BAC test upon arrest for driving while intoxicated is constitutional. The answer is yes.

Although the Court has sometimes described the unconstitutional-conditions doctrine in absolutist terms,

the decisional history paints a far more balanced picture. Many times, the Court has upheld conditioning benefits or privileges on forgoing a constitutional right. *See, e.g.*, *Lyng v. Automobile Workers*, 485 U.S. 360 (1988); *Grove City Coll. v. Bell*, 465 U.S. 555 (1984); *Connick v. Myers*, 461 U.S. 138 (1983); *Snepp v. United States*, 444 U.S. 507 (1980); *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973); *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75 (1947). To the extent that Birchfield claims *all* such conditions are unconstitutional, Br. 33-35, he is wrong.

Birchfield is similarly mistaken in suggesting that, even if such conditions may be upheld as constitutional in other settings, the Fourth Amendment is different. Br. 30. The Court has held, for example, that contractors must "permit inspection of [their] accounts and records" as a condition of "obtain[ing] the government's business." *Zap v. United States*, 328 U.S. 624, 628 (1946), *vacated on other grounds*, 330 U.S. 800 (1947). Such a requirement would be unconstitutional if Birchfield were correct that no conditions may be placed on Fourth Amendment rights. Moreover, there is no basis for giving Fourth-Amendment rights greater protection than First-Amendment speech rights or the Fifth-Amendment right to just compensation. The Court has consistently applied the unconstitutional-conditions doctrine in those areas—sometimes upholding the condition and sometimes striking it down. *See infra* 48-54. There is no basis for applying the doctrine differently here.

Further, Birchfield's bright-line rule would prove too much. If no condition could be placed on Fourth Amendment rights, then statutes that, as a penalty for

refusing a BAC test, suspend the arrestees' license and/or use the refusal as evidence against him in a criminal trial likewise would be unconstitutional. But *Neville* has upheld such laws as within a State's power to impose conditions on individuals who use its roads. In other words, the Court has not only upheld the constitutionality of such conditions in the context of the Fourth Amendment generally, it has upheld them in *this* particular Fourth Amendment context.

That is why *McNeely* described "implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense" as being among the "broad range of legal tools" that States may use "to enforce their drunk-driving laws and to secure [blood-alcohol] evidence without undertaking warrantless nonconsensual blood draws." 133 S. Ct. at 1566 (2013) (plurality opinion).[7] As the opinion explained, "[s]uch laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against

7. Although this section of *McNeely* did not command a majority of the Court, no opinion in *McNeely* expressed disagreement with the plurality's endorsement of implied-consent laws as a constitutional response to the epidemic of drunk driving. Quite the opposite, the plurality highlighted these laws to blunt criticism from the concurring and dissenting opinions that the ruling was going to undermine effective enforcement of drunk-driving laws. *McNeely*, 133 S. Ct. at 1569, 1573-74 (Roberts, C.J., concurring and part and dissenting in part); *id.* at 1576-78 (Thomas, J., dissenting).

him in a subsequent criminal prosecution." *Id.* (citations omitted). Yet there was no indication that these laws might be vulnerable to attack on unconstitutional-conditions grounds.

The issue, accordingly, is not whether North Dakota may "impose significant consequences" for refusing to take a chemical test in violation of its implied-consent statute. It may. The issue is whether making that refusal a misdemeanor requires a different answer. In examining that question, the Court should weigh the same factors it has in previous cases of this type: (1) the importance of the governmental interest; (2) the nature of the constitutional interest and the degree of interference with it; and (3) the significance of the condition the law imposes. *Neville*, 459 U.S. at 558-64; *Mackey*, 443 U.S. at 11-17. These factors weigh in favor of upholding the condition.

First, the Court has conclusively found that States have a "compelling governmental interest in combating drunk driving." *McNeely*, 133 S. Ct. at 1565; *id.* at 1571 (Roberts, C.J., concurring in part and dissenting in part). This follows from the understanding that States have a "compelling interest in highway safety." *Mackey*, 443 U.S. at 19; *Dixon v. Love*, 431 U.S. 105, 114 (1977) (recognizing "the important public interest in safety on the roads and highways, and in the prompt removal of a safety hazard"); *Reitz v. Mealey*, 314 U.S. 33, 36 (1941) ("The use of the public highways by motor vehicles, with its consequent dangers, renders the reasonableness and necessity of regulation apparent.").

The causal relationship between highway safety and drunk driving "is well documented and needs no detailed

recitation here." *Neville*, 459 U.S. at 558; *Breithaupt*, 352 U.S. at 439 ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield."). "For decades," "this Court has 'repeatedly lamented the tragedy.'" *Sitz*, 496 U.S. at 451 (quoting *Neville*, 459 U.S. at 558). Although "some progress has been made, drunk driving continues to exact a terrible toll on our society." *McNeely*, 133 S. Ct. at 1565. North Dakota is sadly no exception. *See supra* at 2-10.

North Dakota's implied consent and criminal refusal laws substantially advance this "paramount interest" in multiple ways. *Mackey*, 443 U.S. at 17. It is settled law that penalizing refusal "serves as a deterrent to drunken driving." *Id.* at 18. Experience has shown, moreover, that making refusal a misdemeanor more effectively deters drunk driving. Offenders effectively can circumvent the administrative penalty of license revocation, thereby stripping that penalty of its deterrent value. *See supra* 7; HB1302 History at 2-3. Statistics bear this out. Since 2012, when North Dakota passed Brielle's law to provide criminal penalties for BAC test refusal, drunk-driving fatalities have dropped 38%; and the percentage of automobile-crash fatalities that were alcohol-related fell to a decade low. *See supra* 9-10.

Making refusal a misdemeanor also "provides strong inducement to take the ... test and thus effectuates [North Dakota's] interest in obtaining reliable and relevant evidence for use in subsequent criminal proceedings." *Mackey*, 443 U.S. at 18. Indeed, one of the primary purposes of Brielle's law was to encourage drunk-driving arrestees to opt to take the chemical test. Given the high

rate of refusals under the prior version of the statute, lawmakers were rightly concerned that arrestees viewed administrative penalties as an easily evaded "loophole" that would allow them to escape punishment "no matter how intoxicated [they] are." HB1302 History at 155-56.

Finally, the law reduces the likelihood of potentially violent encounters between police and drunk drivers. If a refusal is not criminalized, police are more likely to proceed with chemical testing either after securing a search warrant or immediately if exigent circumstances exist. This is due to the centrality of such evidence to a successful drunk-driving prosecution. *See infra* 41. The police will have no choice but to press ahead (possibly forcibly) with a test they likely need to secure conviction.

But forcing this confrontation is a bad idea. Because the arrestee is intoxicated, often highly so, pressing ahead with the test in the face of a refusal creates a high risk of a physical confrontation. Using force to administer the test is not in the interest of police officers, arrestees, or the medical personnel stuck between them. And it would present a particularly grave risk of danger to law enforcement officers in rural parts of North Dakota, where there often is only one officer on duty at any given time. *See supra* 7. Thus, criminalizing the refusal to take chemical tests is likely to reduce the occurrence of dangerous situations in which police offers must take non-consensual chemical testing from arrestees.

Second, the constitutional interest that Birchfield invokes—the right to refuse a chemical test—is far from the Fourth Amendment's core. As an initial matter, the test is taken only after the individual has been placed

under arrest based on probable cause that he was driving under the influence of alcohol or drugs. *See supra* 8-9. The context of when and where the chemical test occurs is important. "The expectations of privacy of an individual taken into police custody 'necessarily [are] of a diminished scope.'" *Maryland v. King*, 133 S. Ct. 1958, 1978 (2013) (quoting *Bell v. Wolfish*, 441 U.S. 520, 557 (1979)). That is not to suggest that a person arrested for drunk driving lacks any expectation of privacy. *McNeely*, 133 S. Ct. at 1558. "Once an individual has been arrested on probable cause for a dangerous offense that may require detention before trial, however, his or her expectations of privacy and freedom from police scrutiny are reduced." *King*, 133 S. Ct. at 1978.

More fundamentally, the fact that the right invoked here will rarely be sustainable even in the absence of consent highlights the relative weakness of Birchfield's interest. Birchfield frames the constitutional interest that he seeks to preserve as the "constitutional right to resist a search that is not supported by a warrant or an exception to the warrant requirement." Br. 4. In evaluating where on the spectrum of Fourth-Amendment rights this interest falls, the Court must therefore analyze how often the right to refuse the chemical test will actually result in no search in the absence of the criminal-refusal statute. An implied-consent law, for example, that required residents to allow the police to search their homes whenever they knock on the front door and request entry would interfere with a right that goes to the heart of the Fourth Amendment; it is safe to say that the vast majority of those searches would not occur without consent. By contrast, a statute requiring foster parents to consent to a search of their homes upon a finding of probable cause of child endangerment would

not raise the same Fourth Amendment concerns; most of those searches are going to occur—consent or not.

Here, the suspect's refusal will almost never be an impediment to conducting the search as far as the Fourth Amendment is concerned. In *McNeely*, the Court divided over whether the need to perform a timely chemical test before the evidence dissipates always, often, or sometimes will create the exigent circumstances needed to dispense with the warrant requirement. 133 S. Ct. at 1558-68; *id.* at 1570-73 (Roberts, C.J., concurring in part and dissenting in part); *id.* at 1575-78 (Thomas, J., dissenting). But no Member of the Court suggested that an arresting officer would have difficulty making out the probable cause needed to justify the search. In the overwhelming majority of instances, that is, the suspect's ultimate right "to refuse the blood-alcohol test" will be "simply a matter of grace bestowed by the [North] Dakota legislature." *Neville*, 459 U.S. at 565. Whether he consents or not, the police will be able to perform the test.

The regrettably typical circumstances of Birchfield's arrest illustrate the point. After having driven his car into a ditch and exhibiting numerous signs of intoxication to the responding trooper, he failed all four field sobriety tests he was administered and failed a breath test with a BAC over three times the legal limit. *See supra* 10-12; Brief for Respondent at 3-4, *Beylund v. Levi*, No. 14-1507 (Mar. 15, 2016) ("Beylund Br."). It cannot be disputed that there was probable cause justifying the chemical test.

Furthermore, not only is the right to refuse this test at the periphery of the Fourth Amendment, but it causes only minimal intrusion. The chemical test of course is a

search. *McNeely*, 133 S. Ct. at 1558-60. At the same time, however, "[s]uch tests are a commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain." *Schmerber*, 384 U.S. at 771; *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 625 (1989) ("[T]he intrusion occasioned by a blood test is not significant."). They are in fact "so safe, painless, and commonplace," the police may "compel the suspect, against his will, to accede to the test." *Neville*, 459 U.S. at 563; *McNeely*, 133 S. Ct. at 1565.

Third, and last, use of public roads, both as a matter of precedent and North Dakota law, is a privilege that the State is not required to extend. *See, e.g.*, *Kane v. New Jersey*, 242 U.S. 160, 167 (1916) ("The power of a state to regulate the use of motor vehicles on its highways has been recently considered by this court and broadly sustained. It extends to nonresidents as well as to residents."); *State v. Kouba*, 319 N.W.2d 161, 163 (N.D. 1982) ("The use of the public highways is not an absolute right which everyone has, and of which a person cannot be deprived; it is instead a privilege which a person enjoys subject to the control of the State in its valid exercise of its police power."). "The highways belong to the state. It may make provision appropriate for securing the safety and convenience of the public in the use of them." *Buck v. Kuykendall*, 267 U.S. 307, 314 (1925) (citation omitted)). Birchfield does not disagree. Br. 34.

That is not to suggest that access to North Dakota's public roads is unimportant. Indeed, Birchfield anchors his argument to the proposition that "the ability to drive is

a practical necessity for most adults in our society" given that they are "entirely dependent on their ability to drive to commute to work, attend school, buy groceries, or visit a doctor." Br. 22-23. Birchfield, in other words, targets "[d]rivers' license suspension or revocation" itself as the penalty that cannot be imposed for revoking consent. Br. 36. But that argument is foreclosed in light of *Neville*. *See supra* 23-24.

To prevail, Birchfield must explain why making his refusal a misdemeanor is unconstitutional even though revocation of his license, which "effectively precludes many people from earning a living or engaging in the necessities of daily life," Br. 36, "is unquestionably legitimate, assuming appropriate procedural protections," *Neville*, 459 U.S. at 560. But Birchfield offers no serious argument on that score. The most he will say is that the Court has not yet upheld a condition that imposed criminal penalties. Br. 38. But that just begs the question; the Court has not previously confronted the issue.

Furthermore, the bare fact that revoking consent has criminal consequences, in and of itself, does not cross a constitutional line. The Court has upheld using refusal as evidence to secure a criminal conviction. *Neville*, 459 U.S. at 563-64.[8] And, importantly, this not a case in which the

---

8. Moreover, a number of States permit the imposition of civil fines as part of their administrative remedies. *See, e.g.*, N.Y. Veh. & Traf. Law § 1194(2)(d)(2) ("[A]ny person whose license, permit to drive, or any non-resident operating privilege is revoked pursuant to the provisions of this section shall also be liable for a civil penalty in the amount of five hundred dollars."). Birchfield makes no effort to explain why imposing such penalties through an administrative process is constitutionally acceptable but imposing them criminally (almost always as a misdemeanor) is not.

driver is charged with a felony. That might be a different situation; the collateral consequences of a felony conviction would need to be factored into the equation. ACLU Amicus Br. 13-14. Here, the misdemeanor penalties for refusal are no more severe than the penalties for failing the test at the lowest level (0.08% BAC). *See supra* 9.

Birchfield is thus left with a reductionist argument: "it should be obvious that there is a material difference between license-revocation statutes" and those carrying criminal sanctions. Br. 40. But given his description of driver's licenses as indispensable to the ability to "earn a livelihood or participate meaningfully in society," Br. 36, and his failure, in turn, to explain why a misdemeanor charge is different in kind than the civil penalties he must accept as constitutional, the assertion is far from obvious. As Birchfield frames the role of driving in modern society, arrestees might well choose a misdemeanor conviction over suspension of their license.

At bottom, there is no dispute that North Dakota's criminal refusal law increases pressure on those arrested for driving under the influence of alcohol or drugs to consent to a chemical test. That is a primary purpose. That is the beginning of the unconstitutional-conditions inquiry, however, not the end of it. The Court's decisions in this area reflect an attempt to balance the individual's interest in refusing consent against the State's interests in public safety.

North Dakota struck the appropriate balance for its citizens. North Dakota's interest is compelling, Birchfield's right is at the periphery of the Fourth Amendment, the intrusion occasioned by the chemical test is minimal, and

making the revocation of consent a misdemeanor does not raise special concerns beyond those presented by the civil and criminal-evidentiary penalties that *Neville* sustained. The Supreme Court of North Dakota correctly upheld the law as a constitutional condition.

C. No other decision requires the Court to declare North Dakota's statutory scheme unconstitutional.

Birchfield relies on an array of cases to contend that precedent forecloses upholding the North Dakota law as a constitutional condition. If anything, as explained above, he has it backwards. Regardless, no decision upon which Birchfield relies supports his argument.

Birchfield first argues that his consent was invalid under "the traditional totality of the circumstances test." Br. 22. But Birchfield confuses two distinct concepts. For purposes of the Fourth Amendment, consent must be individualized and voluntary based on the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 224-27 (1973). That is why the officers, in accordance with North Dakota law, informed Birchfield of the implied-consent statute, of his right to revoke consent, and the consequences of doing so. *See supra* 10-12. That process ensured that Birchfield's consent would have been upheld as voluntary under the Fourth Amendment had he, like Beylund, taken the chemical test and then tried to suppress it in the drunk-driving proceeding. Beylund Br. 3-6.

But those requirements have no bearing on whether an implied-consent law fails for lack of voluntariness when

no Fourth-Amendment search occurs. The question here, as explained above, is whether the statutory condition is unconstitutional—not whether it satisfies the *Schneckloth* voluntariness test. Petitioner cannot bypass that inquiry on the assumption that attaching any condition on the use of state roads is always "the product of 'duress or coercion, express or implied.'" Br. 22 (quoting *Schneckloth*, 412 U.S. at 248). The question does not answer itself. If it did, the civil penalties for refusing the chemical test would be invalid too.

Birchfield's reliance on the "special needs" line of decisions also misses the mark. Br. 15-18. Those cases defined "the limited circumstances in which suspicionless searches are warranted." *Chandler v. Miller*, 520 U.S. 305, 308 (1997) (citing *Skinner*, 489 U.S. at 608-13). But those decisions are irrelevant. Birchfield was not searched, so no exception to the warrant and probable cause requirements is needed. *See supra* 10-12. This same distinction defeats his reliance on *Patel*. Br. 27-28. *Patel* involved "the administrative search exception to the warrant requirement," which is a species of "special needs" cases. 135 S. Ct. at 2452. This is not an administrative search case.

Finally, Birchfield is similarly misguided in seeking support from *Camara v. Municipal Court of City and Cty. of San Francisco*, 387 U.S. 523 (1967). Br. 31-32. *Camara* announced two important propositions. First, the Fourth Amendment warrant requirement applies to "municipal fire, health, and housing inspection programs ... to determine whether physical conditions exist which do not comply with minimum standards prescribed in local regulatory ordinances." *Camara*, 387 U.S. at 530. Second,

"'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." *Id.* at 538. For reasons described above, this case implicates neither holding.

Birchfield therefore must concede that *Skinner*, *Patel*, and *Camara*, by their terms, do not apply here because Birchfield was not searched. Birchfield's actual argument seems to be that "the Court could have" analyzed those cases under the unconstitutional-conditions doctrine, but it "did not look" at them "in those terms." Br. 30. But this is incorrect. The Court "follow[s] the principle of party presentation" because "the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Greenlaw v. United States*, 554 U.S. 237, 243-44 (2008) (citation omitted). This is why the Court typically refrains from addressing arguments not "urged by either party" or "presented to or passed on by the lower courts." *Wolfish*, 441 U.S. at 531 n.13. The unconstitutional-conditions doctrine was not raised by the parties or presented to the lower courts in any of those cases.

Nor could it have been in the majority of them. The Court could not "have said" in *Patel* that "the government conditioned grant of the license to operate a hotel on the hotel owner's submission to a warrantless search." Br. 30. That is not how the municipal ordinance in question functioned. *Patel*, 135 S. Ct. at 2447-48. Likewise, the Court could not have said that San Francisco "had attached submission to a warrantless search as a condition on the right to live, or operate a warehouse." Br. 32. That is not how the San Francisco ordinance worked either.

Camara, 387 U.S. at 525-26 & n.1; *See v. City of Seattle*, 387 U.S. 541, 541-42 & n.1 (1967) (same).

Notably, the unconstitutional-conditions argument might have been available in at least some of the "special needs" cases upon which Petitioner relies. In *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), the Court limited review to the lower "court's holding on the 'special needs' issue" and "assume[d] for purposes of [its] decision—as did the Court of Appeals—that the searches were conducted without the informed consent of the patients," *id.* at 76. The Court "reversed and ... remanded for a decision on the consent issue." *Id.* In *Skinner* and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), the United States declined to raise implied consent. The Court thus had no occasion to reach the issue.

More fundamentally, Birchfield believes that the implied-consent argument proves too much. In his view, if it is a winning argument here, it would have been a winning argument in *Patel* and *Camara* too. He is incorrect. Even accepting the counterfactual assertion that the argument was available in those cases, it is far from clear that it would have prevailed.

For example, *Patel* would have involved the physical search of business records as a condition of operating in the city to "ensure compliance with [a] recordkeeping requirement." 135 S. Ct. at 2452. *Camara* similarly would have involved the physical search of a home as a condition of residing in the jurisdiction to guard against "possible violations of the city's Housing Code." 387 U.S. at 526. Compared to North Dakota's statute, then, these hypothetical laws would have required implied consent to

more intrusive searches based on far less individualized suspicion of wrongdoing, and which, at least at first blush, would do substantially less to advance weaker government interests. The fact this argument was not raised in *Patel* or *Camara* thus sheds no light on the proper resolution of this case.

II. Invalidating North Dakota's Statutory Scheme Would Undermine The States' Ability To Protect The Public From Drunk Drivers.

The Court's approach to issues like this has been, above all, practical. That is the lesson of the Court's free speech, takings, and spending cases. The consequences of forbidding States from making revocation a misdemeanor are significant. Traffic safety, public health, and legal experts broadly agree that refusal laws, such as North Dakota's, are needed to combat drunk driving. Upholding them would not, as Birchfield suggests, eviscerate decisions such as *McNeely*. The legal penalties for a drunk-driving conviction, in many cases, will be more severe than the penalty for revoking consent to take the chemical test. Upholding these laws would appropriately recognize that arrestees have a Fourth Amendment right to revoke their consent, but exercising that constitutional right is not always costless.

A. Refusal laws are important tools in the battle against drunk driving.

For more than 60 years, this Court has emphasized the important role implied-consent laws play in protecting the public and ensuring safe roads. *See supra* 21-25. Most recently, *McNeely* pointed to N.D. Cent. Code § 39-20-

01 (among other state laws) as demonstrating why the ruling was not going to "compromis[e] drunk-driving enforcement efforts in the States" or "severely hamper effective law enforcement." 136 S. Ct. at 1566-67 & n.9 (quoting *Tennessee v. Garner*, 471 U.S. 1, 19 (1985)). The Court's endorsement of these laws is an important consideration. "A governmental practice that has become general throughout the United States, and particularly one that has the validation of long, accepted usage, bears a strong presumption of constitutionality." *John Doe No. 1 v. Reed*, 561 U.S. 186, 221 (2010) (Scalia, J., concurring in the judgment) (citations and quotations omitted).

North Dakota and other States have taken to heart the Court's decades-long guidance in this area as they developed and implemented strategies to combat drunk driving. This is a serious problem with which the States continue to struggle: the NHTSA reported 9,967 alcohol-impaired-driving fatalities in 2014 alone, constituting 31 percent of all traffic-related fatalities that year. NHTSA, Traffic Safety Facts, 2014 Crash Data Key Findings 1 (No. 812219, Nov. 2015), http://goo.gl/k63prg. Since 2000, more Americans have lost their lives in alcohol-related traffic accidents than in every armed conflict from Vietnam through the present combined. *See supra* 1-2. In the face of this ongoing crisis on America's roads, the States have found refusal penalties to be a key piece of their overall efforts to fight drunk driving.

The practical need for refusal penalties is clear. If a suspect who has been arrested for drunk driving can freely refuse a drug or alcohol test (notwithstanding the implied consent statute), he can deprive law enforcement of key (often essential) evidence necessary to prove

impairment and to prosecute drunk driving. There is little doubt that the absence of testing evidence can prevent accountability for intoxicated drivers. An exhaustive 2002 study surveyed 390 experienced DWI prosecutors from 35 states and concluded that:

- "Almost ¾ of the prosecutors surveyed reported that a BAC is the single most convincing piece of evidence that can be presented to a jury."

- "[O]fficers experience some form of refusal in 1/3 of their DWI investigations."

- "92% of prosecutors reported that test refusal is more common among repeat offenders."

Robyn D. Robertson and Herb M. Simpson, *DWI System Improvement for Dealing with Hard Core Drinking Drivers*, Traffic Injury Research Foundation xiii (June 2002), http://goo.gl/au17t5. Public health researchers have likewise determined that "there is strong evidence that BAC test refusals significantly compromise the arrest, prosecution, and sentencing of DUI suspects and the overall enforcement of DUI laws in the United States." Robert B. Voas, et al., *Implied-consent laws: A review of the literature and examination of current problems and related statutes*, 40 J. of Safety Research 77, 77 (2009).

This is consistent with North Dakota's experience. Testimony supporting the statutory amendment noted the difficulty prosecutors face in securing convictions without scientific evidence to supplement subjective observations

of police officers. HB History 1302 at 156; Tina Wescott Cafaro, *Fixing the Fatal Flaws in OUI Implied Consent Laws*, 34 J. Legis. 99, 112 (2008) (noting that when no BAC is offered, the jury may believe "the police didn't offer the breathalyzer to a defendant [because they didn't think the defendant was too intoxicated]").

Test refusal is particularly troublesome given that most States now punish drivers based on their actual BAC, rather than circumstantial proof of impairment. Spurred in part by federal law linking transportation funding to the enactment of these statutes, 23 U.S.C. § 163(a); 23 C.F.R. § 1225.1, all States now permit conviction with a BAC of 0.08% or greater—regardless of whether there is other proof of impairment. N.D. Cent. Code § 39-08-01(1)(a). Like many states, North Dakota also provides for aggravated penalties when a first offender's BAC is 0.16% or higher. N.D. Cent. Code § 39-08-01(5)(a)(2). Refusal frustrates these laws by depriving the State of evidence it needs to obtain a conviction under these provisions.

Those individuals who drive under the influence—and especially repeat offenders—are aware of the importance of BAC evidence and frequently refuse to submit to testing for strategic reasons. NHTSA, Alcohol & Highway Safety: A Review of the State of Knowledge 174 (No. 811374, Mar. 2011) ("[M]ultiple offenders were more likely than first offenders to refuse the chemical test."), http://goo.gl/T2OWW5. In 2011, NHTSA reported that the median refusal rate nationwide was 24 percent and, in some places, ranged as high as 80 percent. NHTSA, Breath Test Refusal Rates in the United States–2011 Update 1 (No. 811881, Mar. 2014), http://goo.gl/pKrccz. North Dakota's refusal was 21 percent. *Id.* at 2.

Increasing the penalties for refusal was the natural response to these studies. For years, these penalties were administrative in nature—license suspension or revocation, as well as fines. But as States have increased the punishments for drunk driving, administrative sanctions have increasingly come to be seen as insufficient. When "[t]he sanctions for test refusal are far less severe than those for taking the test and failing it," refusal becomes an obvious strategy. Robertson, *supra*, at xiii. "Thus, the work that advocacy groups and others have done to pass laws and implement other measures to reduce impaired driving based on an objective measure of BAC may be rendered less effective by increases in refusals." Voas, *supra*, at 78.[9]

Moreover, administrative penalties alone are often insufficient to change behavior because many people drive with suspended licenses. One NHTSA study revealed that almost *70 percent* of drivers whose licenses were suspended for driving while intoxicated were observed driving during the period of their suspension. NHTSA, Extent of Driving While Suspended for DWI (No. 278, July 2003), http://goo.gl/Y9z05i. This was of specific concern to the North Dakota legislature when it elected to criminalize refusal. *See supra* 7; HB History 1302 at 3, 62

---

9. The defense bar is aware of the disparity between civil and criminal penalties. For example, a lawyer in Kentucky, a state that does not criminalize refusal, advises drunk-driving arrestees that "[a]ny attorney worth his salt will tell you to refuse" testing and that "despite these seemingly harsh [administrative] consequences of refusal, *it is still beneficial for you to refuse*!" Larry Forman, *Why You Should Always Refuse the Breathalyzer and the Standardized Field Sobriety Tests*, Larry Forman Law Blog (May 11, 2014), https://goo.gl/zjfaAy.

(noting that license suspensions and other civil remedies were insufficient to deter drunk driving).

For these reasons, there is a growing consensus that criminalizing refusal is needed to protect the public from drunk drivers. NHTSA has endorsed increased penalties for test refusal as a solution that is inexpensive, easy to implement, and "[l]ikely to be effective based on balance of evidence from high-quality evaluations or other sources." NHTSA, Countermeasures That Work: A Highway Safety Countermeasure Guide for State Highway Safety Offices, 1-7, 1-9 (No. 811727, April 2013), http://goo.gl/2K7mZY; *id.* at 1-17 ("Criminalizing test refusal decreases the likelihood that impaired drivers can avoid penalties by refusing to be tested. It also ensures the driver will be identified as a repeat offender upon subsequent arrests.").[10] The National Committee on Uniform Traffic Laws and Ordinances (NCUTLO), accordingly, has included criminalization of refusal in its DWI Model Code. NCUTLO DWI Model Code § 102(a), *available at* http://goo.gl/BVjwku. The federal government also has criminalized refusal of a blood-alcohol test on federal property. 36 C.F.R. § 4.23(c)(2).

---

10. *See also* Robertson, *supra*, at 49 (recommending that States "[m]ake refusal a criminal offense" and noting that a criminal conviction will "ensure that suspects who refuse are correctly identified as a repeat offender on a subsequent arrest, even if they are not convicted on the original DWI charge"); Voas, *supra*, at 82 ("[E]xtending just the length of [administrative license suspension] for refusal is not likely to be highly effective if the penalties for conviction are greater[.]"); Cafaro, *supra*, at 121 ("[I]mposing criminal sanctions to accompany the administrative penalty of loss of license or fine will increase the costs of refusing and thus encourage more people to take the BAC test.").

North Dakota's refusal penalties advance a second public interest: safety for officers and arrestees when the latter deny consent. As explained above, employing refusal penalties in lieu of permitting forcible searches of objecting arrestees helps "avoid violent confrontations" where officers face the prospect of forcibly taking blood from resisting offenders. *Neville*, 459 U.S. at 559-60; *Murphy*, 516 N.W.2d at 287; *Nyflot v. Comm'r of Pub. Safety*, 369 N.W.2d 512, 517 (Minn. 1985). North Dakota was particularly concerned about ordering officers to "physically hold [a person] down," as that could lead to aggressive confrontations and endanger officers, "especially [those] in rural [North Dakota] where there may be only one officer." HB History 1302 at 3.

Birchfield's attacks on these efficacy and policy reasons for criminalizing refusal are misleading and unpersuasive. First, he cites the *partial* findings from *one* county in New Mexico in *one* NHTSA study for the sweeping proposition that "[p]rosecutors obtain convictions for drunk driving at about the same rate regardless of whether or not [BAC] test evidence was available." Br. 41. But that same study acknowledged that "[t]he relationship between statewide refusal rates and conviction rates is complex" and influenced by many factors, and that "in the two study sites with the highest conviction rates ..., the State had criminalized refusal, and both sites prosecuted a very high percentage of those arrested for DWI." NHTSA, Breath Test Refusals and Their Effect on DWI Prosecutions 45-46 (No. 811551 July 2012), http://goo.gl/AbcInm. Moreover, other surveys—including one involving hundreds of front-line prosecutors—have consistently found refusal to be an obstacle to the enforcement of drunk-driving laws, particularly with respect to recidivist offenders. *See supra* 41.

Second, Birchfield mischaracterizes NHTSA's recommendation that States provide criminal penalties for refusal, suggesting that its three-star ranking of that proposal is "mediocre." Br. 44. In truth, the guide itself defines the rating as "*Likely to be effective* based on balance of evidence from *high-quality evaluations.*" Countermeasures That Work, *supra*, at 1-9 (emphasis added). Moreover, out of 33 rated countermeasures, enhanced penalties for refusal was one of only a handful that NHTSA rated three stars or better *and* was identified as inexpensive and capable of rapid implementation. *Id.* at 1-7, 1-8, 1-9. The cost and speed of implementation are important considerations that the State naturally can take into account when employing the "broad range of legal tools" available to it in the fight against drunk driving. *McNeely*, 133 S. Ct. at 1566.

In fact, Birchfield's proffered alternatives have their own significant drawbacks. For example, he touts the installation of ignition interlocks as a more effective way to combat drunk driving than criminalization. Br. 45-46. But NHTSA itself acknowledges that implementation of an interlock program is more expensive and time-consuming than the approach North Dakota adopted. Countermeasures That Work, *supra*, at 1-8. Moreover, compliance with interlock requirements is spotty, and (unlike penalties for revoking consent) the technology does nothing to combat drunk driving by first-time offenders. *Id.* at 1-34-1-36.

Birchfield also incorrectly faults North Dakota for providing enhanced penalties only to those offenders with a BAC of 0.18% or higher, rather than 0.16%. Br. 46. He has his facts wrong. North Dakota *has* implemented

the 0.16% standard. N.D. Cent. Code § 39-08-01(5)(a)(2) ("[F]or a first offense when the convicted person has an alcohol concentration of at least *sixteen one-hundredths of one percent* by weight, the offense is an aggravated first offense and the sentence must include a fine of at least seven hundred fifty dollars and at least two days' imprisonment.") (emphasis added).[11] More importantly, North Dakota will be unable to obtain the evidence necessary to support convictions and penalties based on that BAC if it cannot provide adequate incentives to discourage test refusal.

Which brings us to Birchfield's real goal: to require a warrant in every case. *See, e.g.*, Br. 43-44; *id.* at 46 ("As the Court has said in a closely analogous situation, the 'answer to the question of what police must do before [requiring a test of a driver's blood, breath, or urine] is accordingly simple—get a warrant.'") (citation omitted). Of course, Birchfield's reliance on the availability of electronic warrant procedures ignores *McNeely's* express approval of a wide range of alternative measures to fight drunk driving. And the Court in *McNeely* correctly noted that electronic warrants are not the panacea that Birchfield claims. *McNeely* 133 S. Ct. at 1562. Birchfield's preference for warrants over all other tools to obtain BAC information also would lead to a perverse result: more involuntary searches of drunk driving arrestees, which undoubtedly would increase the likelihood of violent confrontations that BAC test refusal penalties are intended to avoid. *See supra* 45.

---

11. In any event, neither of the two threshold amounts would have been sufficient to deter Petitioner, whose breath test registered a BAC of 0.254 percent—higher than that of the drivers who killed the Deuscher family and the Ruiz children, *see supra* 4-5.

In the end, Birchfield would have this Court deal a huge blow to law enforcement. States have developed and implemented strategies based upon decades of precedent granting them broad powers to regulate the use of their roads to protect the public, as well as the specific power to impose "unquestionably legitimate" penalties for refusal of a blood-alcohol test, *Neville*, 459 U.S. at 560. Reversing course would significantly impair the States' ability to ensure public safety. These practical concerns must weigh heavily in the analysis of whether North Dakota may make Birchfield's revocation of consent a misdemeanor.

B. Upholding North Dakota law is consistent with the Court's broader approach to the unconstitutional-conditions doctrine.

Contrary to Birchfield's all-or-nothing position, Br. 10-11, the Court's approach to the unconstitutional-conditions doctrine has accommodated the kind of practical concerns identified above. In many contexts, the Court has approved of conditions tied to a government benefit that could not have been imposed directly. That same approach should apply here.

The Court's analysis of unconstitutional-conditions claims that certain restrictions imposed on the recipients of government funding violate the First Amendment provides an important starting point. Few doubt that the government can "make no law ... abridging the freedom of speech." U.S. Const. amend. I. Under Birchfield's broadest view, then, all of these cases easily could be resolved: if the government cannot restrict protected speech directly, it should never be able to restrict or compel speech as a part of any government benefit or program. But this Court has

repeatedly acknowledged that some restrictions on speech are permissible, even where they could not otherwise be mandated directly.

For example, in *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court upheld restrictions in the Public Health Service Act prohibiting the use of federal funds appropriated for family-planning services "in programs where abortion is a method of family planning," *id.* at 178 (quoting 42 U.S.C. § 300a-6). Acknowledging its prior decisions prohibiting unconstitutional conditions in benefit programs, the Court nonetheless held that "[t]he employees' freedom of expression is limited during the time that they actually work for the project, but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority." *Id.* at 199. The Court acknowledged that in other cases, the same limitation would not necessarily survive—such as when the government used a subsidy to restrict "speech in areas that have 'been traditionally open to the public for expressive activity,' ... or have been 'expressly dedicated to speech activity.'" *Id.* at 200 (internal citations omitted). Therefore, the constitutionality of the condition depended on a particularized assessment of the nature of the subsidy and the reach of the condition. *Grove City Coll.*, 465 U.S. at 575 ("Congress is free to attach *reasonable* and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept") (emphasis added).

A similar thread runs through this Court's analysis of restrictions on the speech and political affiliation of government employees. In *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), the Court noted that "[u]nder

our sustained precedent, conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, *unless the government has a vital interest in doing so*," *id.* at 78 (emphasis added). The Court thus has often assessed the government's particular interest and found that the First Amendment did *not* prohibit a condition on government employment that would have been unconstitutional had it been applied to the public at large.

For example, in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Court reiterated the general rule that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression," *id.* at 413 (quoting *Connick v. Myers*, 461 U.S. 138, 142 (1983). But it nonetheless held that the First Amendment did not "shield[] from discipline the expressions employees make pursuant to their professional duties." *Id.* at 426. The Court reached this conclusion based on a careful assessment of the legitimacy of the government's interest in managing its own employees as compared to the minimal value it placed on protecting the speech at issue. *Id.* at 420-24. Throughout the opinion, the Court necessarily considered the practical effect of the speech restriction and the harm a contrary rule would cause. *Id.* That the government could not restrict this speech but for the right to place a condition on employment did not make the restriction unconstitutional.

Similarly, the Court's decision in *Branti v. Frankel*, 445 U.S. 507 (1980), recognized that "if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may

be required to *yield to the State's vital interest in maintaining governmental effectiveness and efficiency*," *id.* at 517 (emphasis added). Therefore, "the Governor of a State may appropriately believe that the official duties of various assistants who help him write speeches, explain his views to the press, or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments." *Id.* at 518. Again, the fact the government could not constitutionally take adverse action against a citizen-at-large based on her party affiliation did not prohibit party affiliation from being an acceptable condition of employment under those circumstances.

The Court's analysis of unconstitutional-conditions claims under the Takings Clause follows the same pattern. The Court has been mindful of the need to protect "the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013). At the same time, the Court has understood that "[i]nsisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy" and has "long sustained such regulations against constitutional attack." *Id.* at 2595 (citation omitted). To balance these concerns, the Court has required "an essential nexus" between a "legitimate state interest" and the permit condition, as well as that the condition "is related both in nature and extent to the impact of the proposed development." *Dolan v. City of Tigard*, 512 U.S. 374, 386, 391 (1994). This requirement of "rough proportionality," *id.* at 391, recognizes that while the government may have legitimate reasons to impose a condition on landowners' permits, the condition will need

to be justified in light of the alleged governmental need and the degree of infringement on the landowner's right, *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987) (the "constitutional propriety" of the condition must "further the end advanced as the justification for the prohibition.").

Even those cases that speak directly of the need to avoid "coercing" a party into surrendering constitutional rights still require a tailored analysis of the condition. Thus, in *South Dakota v. Dole*, 483 U.S. 203 (1987), the Court approved a condition requiring states to raise their drinking ages to receive federal highway funds—"even if Congress may not regulate drinking ages directly," *id.* at 206. In the Court's view, there was no dispute as to "the germaneness of the condition to federal purposes" where "the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel." *Id.* at 208. Moreover, the Court rejected the argument that the financial incentive at stake passed the point where "pressure turns into compulsion," given the relatively small size of the funds at question. *Id.* at 211 (citation omitted). That no State was willing to forego those funds was not decisive: "We cannot conclude ... that a conditional grant of federal money of this sort is unconstitutional simply by reason of its success in achieving the congressional objective." *Id.* By contrast, in *National Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566 (2012), the Court did find coercive a Medicaid spending condition that threatened States with the loss of "over 10 percent of a State's overall budget" because, given the State's reliance on Medicaid funding, the condition "accomplishe[d] a shift in kind, not merely degree," *id.* at 2605.

Finally, even in the area of conditions on the use of public roads—the precise government privilege at issue here—the Court has considered the degree of relation between the benefit at issue and the challenged restriction. In *Stephenson v. Binford*, 287 U.S. 251 (1932), this Court rejected a constitutional challenge to a requirement that contract carriers obtain a permit and submit to regulation as a condition of using public highways. The restrictions at issue "rest[ed] definitely upon the policy of highway conservation," *id.* at 275. This distinguished the case from *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583 (1926), where the Court has invalidated a California statue requiring a similar permit but which was intended to "protect the business of those who were common carriers in fact by controlling competitive conditions," and had "no relation to the highways." *Stephenson*, 287 U.S. at 275. In other words, the precise relationship between the benefit at issue and the condition mattered—as it does here.

Again, this is not to deny that some conditions on government benefits or privileges may be unconstitutional. But as these cases show, that question *always* requires a close analysis of the propriety and the importance of the government interest, and the extent to which the condition advances it. Whether viewed as sufficiently "germane[]," *Dole*, 483 U.S. at 208, "reasonable," *Grove City*, 465 U.S. at 575, "rough[ly] proportional[]," *Dolan*, 512 U.S. at 391, or "relat[ed]," *Stephenson*, 287 U.S. at 275, the judicial task is the same: the Court must weigh the competing interests and the extent to which the condition advances a proper government objective.

For the reasons set forth above, North Dakota law would meet any of these tests. *See supra* I.B. The law is germane to North Dakota's compelling interest in combatting drunk driving. And there is both a nexus and a rough proportionality between that interest and the condition imposed under the implied-consent statute. Last, making refusal a misdemeanor is reasonable under *Mackey* and *Neville*, when all the factors involved are weighed.

C. North Dakota's implied-consent penalties do not vitiate the expectation of privacy protected by the Fourth Amendment.

Finally, Birchfield incorrectly claims that upholding North Dakota's refusal statute would "vitiate[] the right recognized in *McNeely*." Br. 15. That right, *viz.*, to avoid "warrantless nonconsensual blood draws," *McNeely*, 133 S. Ct. at 1566, remains intact. In North Dakota, once an arrestee revokes consent, he generally will not be subject to such a search.[12] Therefore, refusal means they will typically avoid the test even when police have sufficient grounds to obtain a warrant and could take the sample from a non-consenting party. Further, the imposition of misdemeanor penalties for refusal are not materially different from the administrative penalties upheld in *Neville* and cited favorably in *McNeely*. To be sure,

---

12. That arrestee will never be subject to a warrantless search. North Dakota law enforcement, however, will seek a search warrant authorizing a chemical test where consent has been revoked in limited circumstances. In particular, police often will seek a warrant where the arrestee has caused serious bodily injury or death. *See* N.D. Cent. Code § 39-08-01.2 (enhanced penalties for "criminal vehicular death" and "criminal vehicular injury").

drivers arrested on suspicion of drunk driving may face an unpleasant choice, but this Court has never held that such choices are barred by the Constitution.

Beyond preserving the protection of the "privacy, dignity, and security" of arrestees who wish to avoid a chemical test, *Skinner*, 489 U.S. at 613-14, offenders may have other reasons to stand on their right and deny consent to a search. They may wish to avoid the stigma of a drunk-driving conviction, or collateral consequences in employment or other areas that might not attach to a refusal violation. They may also wish to deprive the State of additional evidence it could use to enhance a sentence. N.D. Cent Code § 39-08-01(5)(a)(2). North Dakota leaves room for arrestees to make that choice.

That the decision comes at a price—in this case, a misdemeanor conviction—is hardly remarkable. This law arises from North Dakota's long-recognized authority to regulate the use of its roads to promote public safety and fits comfortably within the framework of consequences for refusal that this Court has repeatedly upheld. Most importantly, the law advances a critical and compelling state interest to prevent the slaughter that took the lives of innocent victims like Brielle Deutscher and Alaries and Cyris Ruiz.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

THOMAS R. MCCARTHY
WILLIAM S. CONSOVOY
J. MICHAEL CONNOLLY
BRYAN K. WEIR
CONSOVOY MCCARTHY PARK PLLC
GEORGE MASON UNIVERSITY
SCHOOL OF LAW SUPREME
COURT CLINIC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-9423

PATRICK STRAWBRIDGE
CONSOVOY MCCARTHY PARK PLLC
GEORGE MASON UNIVERSITY
SCHOOL OF LAW SUPREME
COURT CLINIC
10 Post Office Square
8th Floor South PMB
Suite 706
Boston, MA 02109
(617) 227-0548

BRIAN DAVID GROSINGER
Counsel of Record
ASSISTANT STATE'S ATTORNEY
Morton County Courthouse
210 Second Avenue NW
Mandan, North Dakota 58554
(701) 667-3350
brian.grosinger@mortonnd.org

MICHAEL PARK
CONSOVOY MCCARTHY PARK PLLC
GEORGE MASON UNIVERSITY
SCHOOL OF LAW SUPREME
COURT CLINIC
3 Columbus Circle, 15th Floor
New York, NY 10019
(212) 247-8006

Counsel for Respondent

March 15, 2016